

November 7, 2011

Tom Landwehr, Commissioner
Minnesota Department of Natural Resources
500 Lafayette Road
St. Paul, MN 55155

**Re: *In the Matter of the Appeal of the Invasive Species/Infested Waters*
Citation Issued to Frank Lowry;
OAH Docket No: 7-2000-22370-2**

Dear Commissioner Landwehr:

On November 3, 2011, a Prehearing Conference was held in this matter by telephone. The Administrative Law Judge (ALJ), Conservation Officer Bob Mlynar and Frank Lowry all participated. At the end of the Prehearing Conference, the parties agreed to submit the matter to me for decision without further hearing in order to resolve the matter, and they each affirmed that the facts as stated to me were true. They are summarized as follows:

In early October 2011, Officer Mlynar received a telephone "tip" that a swimming raft (basically, a wooden structure measuring approximately 8 feet square, supported by 55-gallon barrels made of plastic) was situated on the shore of Farm Island Lake in Aitkin County, and that the raft was covered by zebra mussels.

Officer Mlynar investigated the "tip" report by inspecting the swimming raft, and observed approximately 200 zebra mussels attached to various parts of the structure.

Officer Mlynar traced the ownership of the raft to Frank Lowry, whom Mr. Mlynar contacted by telephone. During the course of the telephone conversation between Mlynar and Lowry, held approximately on October 7, 2011, Mr. Lowry admitted he had transported the swimming raft from Prior Lake (in Scott County) to Farm Island Lake in the following manner:

Mr. Lowry towed the swimming raft (which he owns) off its summer location in Prior Lake, a water body that he knew to be infested with zebra mussels, and deposited the swimming raft on a trailer he had placed at the shore. Mr. Lowry then drove the swimming raft/trailer to his residence (also on Prior Lake), a distance of approximately 2-3 miles. After several days, Mr. Lowry transported the trailer/swimming raft to the shore of Farm Island Lake in Aitkin County, where it was observed by the person who phoned in the "tip" to Officer Mlynar. Sometime between transporting the swimming raft/trailer to his home and transporting them to Aitkin County, Mr. Lowry took the swimming raft/ trailer to a commercial car wash facility in a Minneapolis suburb, where he rented self-wash space and used a power hose, equipped with a "wand" on the end, to attempt to "blast" off the zebra mussels that were clinging to various parts of the swimming raft. Lowry cleaned off the mussels that he was able to see and reach with the power hose/wand device at the commercial car wash, but he was unable to see or reach all parts of the underside of the swimming raft.

When Conservation Officer Mlynar contacted Mr. Lowry by telephone regarding the situation, Mr. Lowry related the facts of the matter to Mlynar in a fashion consistent with the summary written in the preceding paragraph. Mr. Lowry admits that he was aware that zebra mussels were a prohibited invasive species under Minn. Stat. §84D.05. He admits also that he did not attempt to apply for a permit to transport the zebra mussels, and that he was not aware of the existence of a program which allowed him to apply for a permit (as presented at Minn. Stat. §84D.11).

Officer Mlynar issued a civil citation for violation of the invasive species act to Mr. Lowry, in accordance with Minn. Stat. §84D.13, subd. 5 (3) which provides for a civil penalty of \$250.00 for unlawfully possessing or transporting a prohibited invasive species. Mr. Lowry has appealed that citation.

IT IS RECOMMENDED that the Civil Penalty Citation issued to Frank Lowry in the amount of \$250.00 for violation of Minn. Stat. § 84D.05 (Possession and Transport of Prohibited Invasive Species) be **AFFIRMED**.

The Administrative Law Judge is persuaded that Officer Mlynar used appropriate discretion in this matter by not charging Mr. Lowry with a criminal violation of the Invasive Species Act, and also by choosing not to simply issue a warning. In imposing a Civil Penalty in the mandated amount of \$250.00, Officer Mlynar chose the "middle ground" between the most severe and most lenient of possible sanctions.

Although Mr. Lowry meant well, he did violate the Invasive Species Act by not removing the zebra mussels from the swimming raft immediately upon removing the raft from Prior Lake, and by not returning the zebra mussels to the waters of Prior Lake. This act of illegal possession then became illegal transportation when Mr. Lowry transported the mussels to his residence, to and from the car wash, and then again from his residence to Aitkin County. The Administrative Law Judge is persuaded that a civil penalty of \$250.00 is appropriate for that illegal activity.

Pursuant to Minn. Stat. §116.072, subd. 6 (e), the Commissioner may not issue a Final Order in this case until at least five (5) days after receipt of the report of the Administrative Law Judge. Frank Lowry may, within those five (5) days, file exceptions to this report or comment to the Commissioner, and the Commissioner must consider the comments. Once the Commissioner has made a final decision, a copy of the decision must be served upon Frank Lowry and the Administrative Law Judge. The final order of the Commissioner may be appealed.¹ If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final Agency decision under Minn. Stat. §1462. Subd. 2. The record closes upon the filing of comments on the report or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

With the issuance of this Recommendation Letter, our file in this matter is closed, and the record is being returned to you.

Very truly yours,

/s/ Richard C. Luis

RICHARD C. LUIS
Administrative Law Judge

Telephone: (651) 361-7843

RCL:jld/mo

Encl.

cc: Colonel Jim Konrad
Conservation Officer Bob Mlynar
Frank Edward Lowry

¹ See Minn. Stat. §§ 14.63 to 14.69.